

# In the United States Court of Federal Claims

No. 04-1201C

Filed January 18, 2005

**NOT TO BE PUBLISHED**

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DAVID POWELL,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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Jurisdiction;

Motion to Dismiss;

*Pro se*;

RCFC 12(b)(1);

Tucker Act, 28 U.S.C. § 1491(a)(1).

**David Powell**, *pro se*, plaintiff.

**Michael J. Dierberg**, Washington, D.C., for defendant, United States Department of Justice.

## MEMORANDUM OPINION AND ORDER

**BRADEN**, *Judge*.

### RELEVANT FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>

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<sup>1</sup> The relevant facts recited herein were derived from: the July 22, 2004 Complaint (“Compl.”); the August 12, 2004 Amended Complaint (“Am. Compl.”); defendant’s September 28, 2004 Motion to Dismiss (“Gov’t Mot. to Dismiss”); Plaintiff’s October 6, 2004 “Verified Motion For Special Injunction” (“Pl. Mot. for Special Inj.”); Plaintiff’s October 7, 2004 “Verified Motion Subpoena of Documents” (“Pl. Mot. Sub.”); Plaintiff’s October 8, 2004 Motion to Dismiss or Vacate Defendant’s Motion to Dismiss (“Pl. Opp.”); and the Government’s October 27, 2004 Reply to Plaintiff’s Motion to Dismiss or Vacate Defendant’s Motion to Dismiss (“Gov’t Reply”).

The claims of David Powell, who is proceeding as a *pro se* plaintiff, arose from events that took place between 1999 and August 2004.<sup>2</sup> See Am. Compl. Exh. A at 1-2. Plaintiff was employed as an inventory clerk by the Miami Dade County Housing Agency, but at some point during 1999 was terminated from his employment.<sup>3</sup> See Am. Compl. Exh. E at 1-2, 4-9.

On August 18, 1999, plaintiff filed a complaint with United States Department of Justice, Civil Rights Division, wherein the Miami Dade County Housing Agency was alleged to have discriminated against plaintiff because of his race, religion, and age. See Am. Compl. Exh. E at 4-9. Plaintiff requested reinstatement to his former position as an inventory clerk. *Id.* In August 2001, plaintiff requested copies of his parents' tax returns from the years 1962-2001 from the United States Department of the Treasury and the Internal Revenue Service ("IRS"). See Am. Compl. Exh. C at 5-6. On January 30, 2004, plaintiff attempted to issue a subpoena in *Powell v. Miami Dade County* to the Secretary of the United States Treasury to obtain the tax returns requested in 2001.<sup>4</sup> See Am. Compl. Exh. C at 3. On May 24, 2004, the Eleventh Judicial Circuit Court of the State of Florida granted the Government's motion to quash the subpoena.<sup>5</sup> See *Powell v. Miami Dade County*, Order

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<sup>2</sup> Plaintiff also has filed actions in the Eleventh Judicial Circuit, Miami Dade County, Florida, and with the State of Florida Commission on Human Relations concerning these events. See *Powell, David et al. v. Miami Dade County et al.*, No. 13-2002-CA-027703 (Fla. 11th Cir. Ct., filed Nov. 4, 2002); *Powell, David v. Robin Fisher & Park Place By The Bay*, Case No. 01-4799 (Fla. Div. Admin., filed Dec. 13, 2001).

<sup>3</sup> The exact date of plaintiff's termination from the Miami Dade County Housing Agency is unclear from the record.

<sup>4</sup> On December 13, 2001, plaintiff filed a Complaint in the State of Florida Division of Administrative Hearings alleging housing discrimination. See *Powell v. Robin Fisher & Park Place By The Bay*. On January 15, 2002, plaintiff attempted to issue a subpoena to the Internal Revenue Service for the same tax returns at issue in *Powell v. Miami Dade County*. See Pl. Mot. Sub. Exh. A at 12-14. On April 5, 2002, the Honorable Claude B. Arrington, Administrative Law Judge, issued an Order quashing all subpoenas and requiring approval by the court before any new subpoenas could be issued. See *Powell v. Robin Fisher & Park Place By The Bay*, Apr. 5, 2002 Order, available at <http://www.doah.state.fl.us/internet/search/detail.cfm?CaseNo=01-004799&urlstring=0>. On June 7, 2002, the Honorable Claude B. Arrington again issued an Order Quashing Subpoenas and Order to Show Cause, and reaffirming the limitations on the issuance of subpoenas set forth in the April 5, 2004 Order. See *Powell v. Robin Fisher & Park Place By The Bay*, Jun. 7, 2002 Order, available at: <http://www.doah.state.fl.us/internet/search/detail.cfm?CaseNo=01-004799&urlstring=0>.

<sup>5</sup> In November 2003, plaintiff also sent a letter to the Federal Bureau of Investigation ("FBI"), requesting that a federal criminal investigation be opened regarding the alleged refusal of the IRS to produce the tax returns demanded by plaintiff. See Am. Compl. Exh. C at 4. On December 3, 2003, the FBI Memphis Chief Division Counsel George W. Bolds IV informed plaintiff by letter that

of May 24, 2004. On October 6, 2004, plaintiff attempted to issue a United States Court of Federal Claims Subpoena for the documents using Form 6, however, the subpoena was invalid.<sup>6</sup>

On March 10, 2003, plaintiff sent a letter to the Mingo Junction, Ohio Police Department, requesting an investigation into the alleged theft of plaintiff's father's automobile and other personal property from his father's residence in Mingo Junction and provided the names of several individuals allegedly suspected of stealing the property. *See* Pl. Mot. for Special Inj. Exh. C at 1-4. Plaintiff claimed an ownership interest in this property through a revocable trust. *Id.* By a letter dated March 20, 2003, the Captain of the Mingo Junction Police informed plaintiff that his office would not conduct a criminal investigation without plaintiff providing proof of ownership of the allegedly stolen property. *See* Pl. Mot. for Special Inj. Exh. B at 2. It is unclear from the record whether plaintiff supplied proof of ownership or whether an investigation of the alleged theft was ever opened.

## **B. Proceedings In The United States Court Of Federal Claims.**

On July 22, 2004, plaintiff filed a Complaint in the United States Court of Federal Claims. *See* Compl. Defendants named included: the United States Department of Housing and Urban Development ("HUD"); the United States Postal Service; the United States Securities and Exchange Commission; and the United States Department of Labor. *See* Compl. at 10. In addition, the State of Ohio; the State of Florida; the County Commissioner of Jefferson County, Ohio; the City of Steubenville, Ohio; the Village of Mingo Junction, Ohio; the County of Dade, Florida; the City of Miami, Florida; and several individuals and corporations were named as defendants. *Id.*

On August 12, 2004, plaintiff filed an Amended Complaint. *See* Am. Compl. The Amended Complaint alleges violations of the United States Constitution, federal and state statutes, and common law provisions. *See* Am. Compl. Causes of Action ¶¶ 1-36. Plaintiff's claims include: negligence and negligence *per se*, *id.* at ¶ 1; "crimes of omission and willful blindness" by the United States Government, *id.* at ¶ 2; "private, public, and political corruption," *id.* at ¶ 3; plagiarism, intellectual property theft, technology piracy, and invasion of privacy, *id.* at ¶ 4; Securities and Exchange Commission "extortion," *id.* at ¶ 6; human rights violations, *see* Am. Compl. Causes of Action ¶¶ 8, 14-15; violation of the Fair Housing Act, *id.* at ¶ 10; retaliatory discharge and constructive ejection, *id.* at ¶ 11; assault, *id.* at ¶ 13; witness tampering, *id.* at ¶ 18; "malpractice of civil liberties, civil defense, [and] civil justice" by the United States Department of Labor and HUD, *id.* at ¶ 19; age discrimination in employment, *see* Am. Compl. Causes of Action ¶ 20; personal injury and mail fraud, *id.* at ¶ 21; elderly abuse, *id.* at ¶ 22; and medical malpractice, *id.* at ¶ 25. It is not clear from the Amended Complaint what claim is asserted against which defendant.

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the FBI had decided not to open a federal criminal investigation. *Id.*

<sup>6</sup> RCFC 45(a)(3) requires that a subpoena be issued by the Clerk of Court or an attorney as an officer of the court, on behalf of the United States Court of Federal Claims. Since plaintiff is not an attorney, the issuance of a subpoena was invalid.

Plaintiff demands: a “non-jury-equitable trial,” *see* Am. Compl. Relief Requested ¶ 1; compensatory and punitive damages for pain and suffering, *id.*; attorneys fees, *id.*; \$800 trillion in “gold blocks” and cash, *id.* at ¶¶ 1, 8; reinstatement of employment at Miami Dade County Housing Agency from which he was terminated in 1999, *id.* at ¶¶ 1, 5; “bankruptcy relief to receive judgment on record,” *id.* at ¶ 6; an order prohibiting practices and patterns of discrimination, bias, and “legal prejudice,” *see* Am. Compl. Relief Requested ¶ 8; and any other equitable relief the court deems just. *Id.*

Plaintiff argues that jurisdiction over the asserted claims is based on: diversity of citizenship, *see* Am. Compl. Jurisdiction ¶¶ 1-3; federal question and appellate jurisdiction, *id.* at ¶ 4; admiralty law, *id.* at ¶ 5; the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, *id.* at ¶ 6; the Investment Advisors Act, 15 U.S.C. § 80b-1 *et seq.*, *id.*; the “Continuing Jurisdiction Doctrine,” *id.*; the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, *see* Am. Compl. Jurisdiction ¶ 6; the Telecommunications Act of 1996, 47 U.S.C. § 101 *et seq.*, *id.* at ¶ 8; and the Internal Revenue Code, 26 U.S.C. § 101 *et seq.*, *id.*

On September 28, 2004, the United States (“the Government”) filed a Motion to Dismiss pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction. *See* Gov’t Mot. to Dismiss at 1. On October 8, 2004, plaintiff filed a “Motion to Dismiss or Vacate Defendant’s Motion to Dismiss” in response. *See* Pl. Opp. at 1. On October 27, 2004, the Government filed a Reply. *See* Gov’t Reply at 1.

## DISCUSSION

### A. Jurisdiction.

The United States Court of Federal Claims is a federal court of limited jurisdiction. *See Terran ex rel. Terran v. Sec’y of Health & Human Services*, 195 F.3d 1302 (Fed. Cir. 1999). The court is authorized, under the Tucker Act, 28 U.S.C. § 1491(a)(1), however, to render judgment and money damages on any claim against the United States based on the United States Constitution, an Act of Congress, a regulation of an executive department, or an express or implied contract with the United States. *See United States v. Testan*, 424 U.S. 392, 397-98 (1976). The United States Supreme Court, however, has held that the Tucker Act does not create any substantive right for monetary damages in *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Instead, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages in order for the court to have jurisdiction. *See Khan v. United States*, 201 F.3d 1375, 1377 (Fed. Cir. 2000).

In *United States v. Mitchell*, 463 U.S. 206 (1983) (“*Mitchell II*”), the United States Supreme Court held that, for jurisdictional purposes, a statute or regulation is money-mandating only if it “can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties it imposed.” *Id.* at 217. The United States Supreme Court revisited *Mitchell II*’s “fair

interpretation” rule in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), wherein the Court explained that:

This “fair interpretation” rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. . . . It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be “lightly inferred,” a fair inference will do.

*Id.* at 472-73 (internal citations omitted).

And, this past year, the United States Court of Appeals for the Federal Circuit held in *Fisher v. United States*, 364 F.3d 1372 (Fed. Cir. 2004) that *White Mountain* revised *Mitchell II*’s “fair interpretation” rule and summarized the now applicable rule as follows:

[U]nder *White Mountain*, when a Tucker Act plaintiff makes a non-frivolous allegation that a particular statute is reasonably amenable, with fair inferences drawn, to a reading that it mandates money damages, a basis for jurisdiction is stated.

*Fisher*, 364 F.3d at 1377.

Our appellate court further held in *Fisher* that:

[T]he process by which a plaintiff undertakes the required jurisdictional showing ordinarily will occur in the context of the initial pleading, a well-pleaded, non-frivolous complaint. . . . [I]f the trial court adjudges that plaintiff does not have a money-mandating source that meets even the new low-threshold jurisdictional test, a dismissal under Rule 12(b)(1) for lack of jurisdiction is appropriate, and that is the end of the matter[.]

*Id.* at 1378.

## **B. The Pleading Requirements for *Pro Se* Plaintiff.**

Traditionally, a *pro se* plaintiff’s pleadings have been held to a less stringent standard than a litigant represented by counsel. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Indeed, it has long been the traditional role of this court to examine the record “to see if [a *pro se*] plaintiff has a cause of action somewhere displayed.” *Ruderer v. United States*, 188 Ct. Cl. 456, 468 (1969).

## **C. Standard Of Review.**

Rule 12(b)(1) of the Rules of the United States Court of Federal Claims governs dismissal of a claim for lack of subject matter jurisdiction. *See* RCFC 12(b)(1). In ruling on a motion to

dismiss, the court is generally “obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff’s favor.” *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974)). Plaintiff, as the non-moving party, however, bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (“[O]nce the [trial] court’s subject matter jurisdiction was put in question it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court’s jurisdiction.”).

**D. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff’s Claims In This Case.**

**1. The United States Court Of Federal Claims Does Not Have Subject-Matter Jurisdiction To Adjudicate Claims Against Defendants Other Than The United States.**

The Tucker Act authorizes the United States Court of Federal Claims to render judgment and money damages on any claim against the United States based on the United States Constitution, an Act of Congress, a regulation of an executive department, or an express or implied contract with the United States. *See* 28 U.S.C. § 1491(a)(1); *Testan*, 424 U.S. at 397-98. In this case, plaintiff has named as defendants: the State of Ohio; the State of Florida; the County Commissioner of Jefferson County, Ohio; the City of Steubenville, Ohio; the Village of Mingo Junction, Ohio; the County of Dade, Florida; the City of Miami, Florida; and several individuals and corporations. The plain language of the Tucker Act authorizes this court to adjudicate claims against the United States, not against states, municipalities, individuals, or corporations. *Id.* Therefore, the court does not have jurisdiction to adjudicate plaintiff’s claims against the non-federal defendants.

**2. The United States Court Of Federal Claims Also Does Not Have Jurisdiction Over Tort Claims Asserted By Plaintiff Against The United States.**

The Tucker Act provides that “the United States Court of Federal Claims [has] jurisdiction to render judgment upon any claim against the United States . . . in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). In the Amended Complaint, plaintiff asserts several causes of action sounding in tort, including: invasion of privacy, retaliatory discharge and willful ejection, personal injury, and medical malpractice. *See* Am. Compl. Cause of Action ¶¶ 11, 13, 20, 22, 25. It is unclear from the language of the Amended Complaint, however, what, if any, of these tort claims are asserted against the Government as opposed to the non-federal defendants. To the extent that any of the tort claims are asserted against the Government, the United States Court of Federal Claims does not have jurisdiction to adjudicate them, and plaintiff must seek relief in a United States District Court. *See* 28 U.S.C. § 1491(a)(1).

**3. The United States Court Of Federal Claims Does Not Have Jurisdiction Over Claims That Are Not Based On Money-Mandating Federal Statutes.**

In the Amended Complaint, plaintiff pleads several federal statutes as the basis for this court's jurisdiction over the asserted claims, including: the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*; the Investment Advisors Act, 15 U.S.C. § 80b-1 *et seq.*; the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the Telecommunications Act of 1996, 47 U.S.C. § 101 *et seq.*; and the Internal Revenue Code, 26 U.S.C. § 101 *et seq.* See Am. Compl. Jurisdiction ¶¶ 1-6, 8. In addition, plaintiff makes no assertions that any of these statutes are reasonably amenable to a reading that requires the award of money damages. At best, the claims set forth descriptions of various events that gave rise to the suits filed in the Eleventh Judicial Circuit of the State of Florida, and make no specific allegations regarding how statutory provisions were violated as a result of these events:

Telecommunications Act of 1996; Pro Se Common Informer; Federal Employees Compensation Act 5 U.S.C.A. §§ 8101-8152; Denied FRAP 44 A, B (1st Time Certified Question or Opinion); Internal Revenue Code Title 26 (Copies of Parents Taxes); Decree Pro Confesso; Denied Family Medical Leave Act 3 Times; Alternative, Supplemental, and Equity Pleading Fed. R.C.P. 8(e)(2) of a Plea In Bar Claims for Relief in Equity R. 8(b)(D); Open Verdict R. 4(a), FRAP 43, and Rule 64, 65, and 69 Statim Guaranteed R. 9(G) w/en Autre Droit[.]

Am. Compl. Jurisdiction ¶ 8.

Willful Retaliatory Discharge and Willful Constructive Ejection On 10-16-00 or About and 11-6-02 by Landlords w/Agreed Attorn and Attornment; 4-21-99 Miami Dade Hsg. Along w/U.S. HUD for Surtax Program, Section 8 Private Rental, Denied 2 Weeks Pay, COBRA Benefits, State Unemployment, Vested Rights Denied E.E.O.C. Chg. No Right To Sue 150A2 02138 172A 300619 for Parents en Autre Droit by Pro Se Trustee. . . .

Am. Compl. Cause of Action ¶ 11.

Penal Action on Pro Se Behalf For Possessory Action of Property At Issue Common Informer Penalty Against Contumax Defendants or Village [of] Mingo Junction and Fire Dept. Contumacy and Concerted Action Refusal to Deal, Clayton Act Contumax and Freehold Super Lien By Pro Se and Motion for R. 65 Injunction for Special, Quia-Timet and Protective Order Relief Statim Fed. R.C.P. 25, 13 to Cure Remedy Defect Order Adjudged Irreparable-Injury Rule Disseisin[.]

*Id.* at ¶ 17.

Even construing all reasonable inferences in plaintiff's favor, the Amended Complaint does not provide a money-mandating statutory provision that was violated. Accordingly, the court has no jurisdiction over the claims asserted in the Amended Complaint. *See Fisher*, 364 F.3d at 1378.

The Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for "public use, without just compensation." U.S. CONST. amend. V, cl. 4. The United States Court of Appeals for the Federal Circuit has stated that whether a constitutional taking has occurred is a question of law based on "factual underpinnings." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003). In *Maritrans, Inc. v. United States*, 342 F.3d 1344, (Fed. Cir. 2003), the United States Court of Appeals for the Federal Circuit established a two-part test: "a court must evaluate whether the claimant has established a 'property interest' for the purposes of the Fifth Amendment [*i.e.*, whether plaintiff has standing];" and the court "must determine whether a taking occurred." *Id.* at 1351. The complaint, however, does not identify what property allegedly was taken by the Government. Therefore, the complaint does not allege facts sufficient to make an evaluation whether a property interest existed or whether a taking occurred. *Id.*

To the extent that the Complaint has attempted to assert violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as the Due Process Clause of the Fifth Amendment, "it is firmly settled that these clauses do not obligate the United States to pay money damages. Therefore, these clauses . . . do not trigger Tucker Act jurisdiction in the courts." *Mullenberg v. United States*, 857 F.2d 770 (Fed. Cir. 1988) (quoting *Testan*, 424 U.S. at 401-02). Accordingly, the United States Court of Federal Claims does not have jurisdiction to adjudicate claims arising from these alleged constitutional violations.

Finally, plaintiff seeks an order or subpoena enabling him to obtain his parents' tax returns for the years 1962-2001. *See* Pl. Mot. Sub. at ¶ 1. The United States Court of Federal Claims, "concurrently with the United States District Courts, has jurisdiction over suits for the refund of taxes." *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991); *see also* 28 U.S.C. § 1346(a)(1).<sup>7</sup> The basis for plaintiff's federal income tax-related claims and the reason for obtaining his parents' tax returns is not stated in the Complaint. Therefore, the court does not have jurisdiction to require the IRS to produce the returns unless a claim for the refund of income taxes is asserted. *See* 28 U.S.C. § 1346(a)(1).

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<sup>7</sup> 28 U.S.C. § 1346(a)(1) provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected[.]

**4. The United States Court Of Federal Claims Does Not Have Jurisdiction To Grant Plaintiff Equitable Relief In This Case.**

Plaintiff has requested “any other equitable relief the court deems just.” *See* Am. Compl. Relief Requested ¶ 8. Although the Tucker Act “permit[s] the [United States] Court of Federal Claims to grant equitable relief [, it must be] ancillary to claims for monetary relief over which it has jurisdiction.” *National Air Traffic Controllers Ass’n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998); *see also* 28 U.S.C. §§ 1491(a)(2), (b)(2). None of these asserted claims are based on any money-mandating statute. For this additional reason, this court lacks jurisdiction to adjudicate the claims asserted in the August 12, 2004 Amended Complaint.<sup>8</sup>

**CONCLUSION**

In this case, the United States Court of Federal Claims has no jurisdiction to adjudicate the claims asserted in the August 12, 2004 Amended Complaint. Therefore, the Government’s September 28, 2004 Motion to Dismiss is granted and the Clerk is ordered to dismiss the August 12, 2004 Amended Complaint.

**IT IS SO ORDERED.**

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**Susan G. Braden**  
**Judge**

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<sup>8</sup> To the extent that plaintiff seeks review of actions of state courts, the proper action is an appeal to the state appellate court in which jurisdiction over the claims is proper.